



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-L-I-F-L-C-

DATE: MAR. 2, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a language school, seeks to permanently employ the Beneficiary in the United States as a foreign language instructor. The Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The Director, Nebraska Service Center, denied the petition on May 5, 2015. The Director's decision concluded that the Beneficiary does not possess the academic credentials required by the labor certification and denied the petition.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director erred in not considering the Beneficiary's degrees to be in a related field. The Petitioner asserts that the Beneficiary meets the minimum requirements for the offered position as stated on the labor certification based on his bachelor's and master's degrees in the related fields of international studies and international policy studies. Upon *de novo* review, we will dismiss the appeal.

I. LAW

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).¹

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign

¹ See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

II. ANALYSIS

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the beneficiary are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).² Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

. . . .

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C.

² Based on revisions to the Act, the current citation is section 212(a)(5)(A).

§ 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

[T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

B. The Minimum Requirements of the Offered Position

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. As explained above, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

Part H of the instant labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree.
- H.4-B. Major field of study: Education, Language Instruction or Related Fields.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: Accepted.
- H.7-A. If Yes, specify the major field of study: Major demonstrating proficiency in target language.
- H.8. Alternate combination of education and experience: Accepted.
- H.8-A. If Yes, specify the alternate level of education required: Bachelor's degree.
- H.8-B. If applicable, indicate the number of years experience acceptable in question 8: 5.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. [W]e require foreign language teachers who are exceptionally well-versed in the language and culture of designated areas . . . Successful applicants must have the ability to teach . . . to a high level of proficiency in the target language. Therefore, near native language proficiency in the specific target language is required . . .

Part J of the labor certification states that the Beneficiary possesses a master's degree from [REDACTED] in [REDACTED] California, completed in 2009. The record contains copies of the Beneficiary's academic transcripts and two diplomas from the [REDACTED] [REDACTED] The Beneficiary was awarded a "Bachelor of Arts in International Studies, Summa Cum Laude," degree on December 26, 2008, and a "Master of Arts International Policy Studies" degree on December 18, 2009.

Part K of the labor certification states that the Beneficiary had worked for the Petitioner in the offered position of foreign language instructor since August 2, 2010.

(b)(6)

Matter of D-L-I-F-L-C-

The Director found that the Beneficiary's bachelor's degree in international studies and master's degree in international policy studies did not meet the requirement listed at Line H.4. or H.7-A. of the labor certification, stating the required field of study as education, language instruction or related fields, or a major demonstrating proficiency in the target language.

In the instant case, the labor certification states that the offered position requires a Master's degree in "Education, Language Instruction or Related Fields" or, in the alternative, a master's degree in a field of study "demonstrating proficiency in target language." On appeal, the Petitioner asserts that the Beneficiary's master's degree in international policy studies is related to the emphasis of the Petitioner's overall mission as described on its website. While the Petitioner asserts that the Beneficiary's advanced degree is in a field related to its program overview, the Petitioner does not explain how a degree in the field of international policy studies relates to the field of education or language instruction. The Beneficiary's academic transcripts from the [REDACTED] do not reflect any coursework in education or language instruction.

If the Petitioner had intended to accept, as an alternative, a degree in a field of study not related to education or language instruction it could have indicated so at Line H.7-A of the labor certification. However, it only indicated here that it would accept a degree in a field of study "demonstrating proficiency in target language." The Beneficiary's degree in international policy studies does not demonstrate language proficiency. While it appears from the Petitioner's statements that the Beneficiary is fluent in several languages, fluency is not listed on the labor certification as an acceptable alternative to the stated degree. The labor certification must represent the employer's actual minimum requirements for the job opportunity. 20 C.F.R. § 656.17(i)(1). The Petitioner's willingness to consider a degree in a field of study not listed on the labor certification casts doubt on the recruitment phase of the labor certification process. It is unclear whether potentially qualified applicants were put on notice that a degree in other fields of study would be accepted, or were dissuaded from applying for the position because they did not possess a degree in education, language instruction, or the target language.

For the reasons explained above, the Petitioner has not established that the Beneficiary possesses the academic credentials required by the labor certification. The Petitioner did not establish that the Beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must be denied.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

Matter of D-L-I-F-L-C-

ORDER: The appeal is dismissed.

Cite as *Matter of D-L-I-F-L-C-*, ID# 15806 (AAO Mar. 2, 2016)